Supreme Court, U.S.
FILED
MAY 4 1999
OFFICE OF THE CLERK

No. 98-1602

In The

Supreme Court of the United States

BRAD M. GOODSPEED and PACWEST PREMIX, INC.,

Petitioners,

v.

WHITMAN COUNTY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Washington's State Environmental Protection Act (SEPA), Chapter 43.21C RCW, creates a property interest protected by the Fourteenth Amendment of the United States Constitution in a threshold determination of environmental non-significance procured by misrepresentation and/or lack of a material disclosure.

2. Whether the Due Process Clause of the Fourteenth Amendment is violated when a threshold determination of environmental non-significance procured by misrepresentation and/or lack of a material disclosure is withdrawn pursuant to a process which permits subsequent review.

3. Whether the Ninth Circuit Court of Appeals erred in affirming the United States District Court's Order of Summary Judgment dismissing the Petitioner's Equal Protection claim for lack of any evidence that he was treated differently than others similarly situated.

PARTIES TO THE PROCEEDING

PacWest Premix, Inc. is a Washington corporation solely owned by Petitioner Brad M. Goodspeed.

Respondent Whitman County is a political subdivision of the State of Washington. Though the Petitioner's Complaint named several defendants, all but Whitman County were dismissed by agreed order.

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STATEMENT OF THE CASE

1. Procedural History

On June 16, 1995, the Petitioner, Brad M. Goodspeed, individually and for PacWest Premix, Inc. (together below "Mr. Goodspeed"), commenced this action in the United States District Court, Eastern District of Washington, alleging that Whitman County had violated his rights to due process and equal protection under the Fourteenth Amendment to the United States Constitution by withdrawing a threshold determination of environmental non-significance (DNS) with respect to a proposed building site.

Whitman County withdrew the threshold determination which it had issued pursuant to Washington's State Environmental Protection Act (SEPA), Chapter 43.21C RCW, after discovering that information contained in Mr. Goodspeed's Environmental Checklist was materially false and/or incomplete.

The Honorable Robert H. Whaley of the United States District Court, Eastern District of Washington, granted summary judgment dismissing Mr. Goodspeed's claims on January 30, 1997 (order filed January 31, 1997). Judge Whaley's decision, in relevant part, held that SEPA did not confer any constitutionally protected property right in a "threshold determination" procured by misrepresentation or lack of material disclosure. Judge Whaley also dismissed Mr. Goodspeed's equal protection claim, holding that he had produced no evidence he had been treated differently than others similarly situated or that Whitman County's actions were in any way done with a "malicious or bad faith intent to injure him." Order

Granting Summary Judgment, Section 2(d), Appendix A-12.[1]

In an unpublished opinion, the Ninth Circuit Court of Appeals affirmed the decision of the District Court. Appendix A-15 through A-16.

Nevertheless and despite the fact that he ultimately completed his project with the benefit of the necessary permits, Mr. Goodspeed continues to allege that he has a constitutionally protected interest in the original DNS.

2. Statement of Facts

Anticipating the termination of his lease for the Idaho site at which he operated a concrete pre-mix plant, Mr. Goodspeed began a search in June of 1991 for a new plant location.

Looking to neighboring Whitman County in the State of Washington, Mr. Goodspeed first identified the so-called "Ranniger site" which was only zoned for agricultural use, not "heavy industrial," the zone classification required for a cement plant. Order Granting Summary Judgment, Appendix A-4 through A-5. Consequently, Mr. Goodspeed applied to re-zone the site. *Id.* After completing the environmental review process, he abandoned the Ranniger site and the requested zone change for it in favor of the so-called "Garrett site" (the property which gives rise to this lawsuit) which was already zoned for heavy industrial use. *Id.*

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[1] Petitioner's Appendix is designated "A-1 through A-16." Respondent's Appendix is designated "B-1 through B-13."

Therefore, the parties' interactions with respect to the Ranniger site are irrelevant to this lawsuit.

(Though the Petitioner implies that he was effectively compelled to abandon the Ranniger site because it was "rumored" he would not be successful in securing the necessary zone change, he has never made any claim, constitutional or otherwise, with respect to it. In considering Whitman County's Motion for Summary Judgment and in order to clearly identify the Petitioner's claims, the District Court inquired of Mr. Chris A. Johnson, then Mr. Goodspeed's counsel,[2] as follows:

THE COURT: Are you making any claim for the handling of the Ranniger site or is this really focused on the Garrett site?

MR. JOHNSON: Focused on the Garrett site, Your Honor.

THE COURT: All right. So we can – the Ranniger site is background, but you are not claiming constitutional deprivation with respect to that site?

MR. JOHNSON: Correct . . .

Transcript of Hearing on Motion for Summary Judgment, Appendix B-1.

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[2] Though the Petitioner's initial Complaint was *pro se*, he had the benefit of counsel on his Amended Complaint and in all matters thereafter before the United States District Court, including the dispositive hearing on Whitman County's Motion for Summary Judgment.

Since the courts below were never asked by the Petitioner to, and did not, address any issue relative to the Ranniger site, this Court's review should be limited to his claims as to the Garrett site.)

After purchasing the Garrett site for the cement plant, on April 27, 1992, Mr. Goodspeed submitted an Environmental Checklist on it to Whitman County. Order Granting Summary Judgment, Appendix A-5. Based on the information contained in it, on April 30, 1992, Mark Bordsen, the Whitman County Planner, issued a threshold determination that the proposed concrete plant would have no significant environmental impact. *Id.* A mandatory comment period ensued and a deadline to appeal Mr. Bordsen's decision was set for June 10, 1992; Mr. Goodspeed was so informed by letter providing:

> . . . We expect that all parties will have received this notification and decision by Tuesday, May 26, 1992, and have therefore set the end of this appeal period for June 10, 1992. **This decision allows the applicant to proceed with other permit applications as needed *at the applicant's own risk that the decision could be appealed and overturned.***

Id., (emphasis in original). Appendix A-5 through A-6.

During the appeal period, Whitman County received numerous letters from the public expressing concerns over the impact of Mr. Goodspeed's proposed concrete pre-mix plant. *Id.* In addition to the issues identified and considered by Whitman County in reviewing Mr. Goodspeed's environmental checklist, these letters revealed two significant issues not previously identified due to the

false and/or incomplete information supplied by Mr. Goodspeed in his checklist.

First, a question was raised with respect to whether the proposed plant was located within a 100-year flood plain. *Id.*, Appendix A-6. In Mr. Goodspeed's environmental checklist, he had indicated "No" to the question "Does the proposal lie within a 100-year flood plain?" *Id.* Subsequent review of the site, however, revealed that the proposed plant was within a 100-year flood plain established by the Flood Insurance Rate Maps published by the U.S. Department of Housing and Urban Development which had been incorporated by reference into the Whitman County Zoning Ordinance. *Id.*, Appendix A-7.

Second, the owners of an adjacent property, Mr. and Mrs. Wendt, expressed concern as to whether the well they shared with the Garrett site was capable of producing sufficient water volume for their residence and the proposed pre-mix plant. *Id.*, Appendix A-6. The Environmental Checklist had inquired on the subject as follows:

> Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known.

Id. In response, Mr. Goodspeed disclosed only the following information:

> Our present usage as indicated by meters is 4,000 gallons per day. May to October.

Order of Summary Judgment, Appendix A-6, citing, Environmental Checklist, at 4, § 3(b)(1).

Nowhere did Mr. Goodspeed disclose that his intended source of water was off-site and shared.

On June 12, 1992, after Mr. Bordsen raised these issues with him, Mr. Goodspeed first asserted that he only intended to use the well shared with the Wendts as a source for his plant's domestic water. Order of Summary Judgment, Appendix A-7. He went on to advise that he had secured an agreement with another adjacent landowner to use yet another off-site well to supply production water. *Id.*

Finding that Mr. Goodspeed had failed to disclose these issues and that they were material, the Whitman County Board of Commissioners (Board of Commissioners) withdrew the DNS pursuant to Washington Administrative Code (WAC) 197-11-340 which *requires* withdrawal if:

> . . . (iii) The DNS was procured by misrepresentation or lack of material disclosure;. . . .

WAC 197-11-340(3)(a)(iii) (See Appendix B-5); Order Granting Summary Judgment, Appendix A-7.

Following such a withdrawal, the same regulation required Whitman County to complete a new checklist. WAC 197-11-340(3)(a)(iii).

On July 6, 1992, Whitman County forwarded its environmental checklist to Mr. Goodspeed. Order Granting Summary Judgment, Appendix A-8. Upon review, the Petitioner decided to accept a Mitigated Determination of Non-Significance (MDNS), which was issued on July 21, 1992. *Id.*

Following expiration of the public comment period, notice of the issuance of the MDNS, together with notice

of the applicable appeal period, was published. *Id.* Appeals were filed on September 11, 1992, and a hearing was held before the Board of Commissioners on October 5, 1992. *Id.* On November 9, 1992, the Board of Commissioners affirmed issuance of the MDNS and entered Findings of Fact and Conclusions of Law consistent with its holding. *Id.*

Thereafter, Mr. Goodspeed constructed and operated a concrete pre-mix plant at the Garrett site.

ARGUMENT

1. No Compelling Reason Exists to Grant Certiorari

1.1 The Criteria Established in Supreme Court Rule 10 and This Court's Prior Decisions Show Review Should Not Be Granted

Review on a writ of certiorari is not a matter of right but, rather, one of judicial discretion. S.Ct.R. 10. While not controlling the Court's discretion, Supreme Court Rule 10 outlines the criteria the Court considers in determining whether to grant review. Such relief is granted by the Court only for compelling reasons. S.Ct.R. 10.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. S.Ct.R. 10.

Consistent with Rule 10, the Court has held that it is not its role to correct evidentiary errors or determine whether evidence supports the judgment of the courts below. *Nat'l Labor Relations Bd. v. Pittsburgh Steamship Co.,*

340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed 479 (1951); *Gen'l Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-9, 58 S.Ct. 849, 82 L.Ed. 1273 (1938) (certiorari not warranted merely to review the evidence or inferences drawn from it). In *Pittsburgh Steamship Co., supra*, the Court said:

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony. . . . In such situations we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Fed. Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193.

Pittsburgh Steamship Co., 340 U.S. at 503.

Similarly, when the issue for review presents a question of state law the Court will "ordinarily accept the determination of local law by the Court of Appeals . . . " *Comm'r of Internal Revenue v. Est. of Bosch*, 387 U.S. 456, 462, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (citations omitted).

In *Huddleston v. Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944), the Supreme Court reviewed a determination of the Tenth Circuit regarding Oklahoma tax law. Subsequent to the Tenth Circuit's decision, the Oklahoma Supreme Court issued opinions raising "such doubt

as to the applicable Oklahoma law as to require its reexamination." *Huddleston*, 322 U.S. at 236. Rather than deciding the case, the Supreme Court remanded the case to the Tenth Circuit, "without passing" on the contentions of the parties. *Id.* 322 U.S. at 237. In reaching this conclusion, the Court indicated:

> [O]rdinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts. When we are called upon to decide them, the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions.

Id. 322 U.S. at 237 (citations omitted).

In this case, none of the factors in Supreme Court Rule 10 or the reasons this Court has outlined in its prior decisions suggest that review is appropriate. Furthermore, the issues herein are of a type this Court has traditionally left to the lower federal courts.

The Petitioner has failed to identify any compelling reason for this Court to grant review, essentially utilizing his Petition to simply reproduce the brief he submitted to the Ninth Circuit Court of Appeals.

Citing only one case from the United States court of appeals, *Wedges/Ledges of California, Inc. v. City of Phoenix, Arizona*, 24 F.3d 56 (9th Cir. 1994), and no state cases at any level, the Petitioner has identified no judicial conflict, whether between the circuit courts or between the Ninth Circuit and either the Washington or United States

Supreme Court. The Respondent knows of no such conflict which would have bearing on this case.

The Petitioner's arguments are as follows:

1. As an evidentiary issue, there was no basis to find he either engaged in misrepresentation or failed to make a material disclosure. Petition for Writ of Certiorari, p. 17;

2. That the courts below incorrectly applied Washington's State Environmental Policy Act (SEPA) in concluding that the law did not create a protected property interest; *see* Petition For Writ of Certiorari, pp. 13-16; and

3. That Petitioner introduced enough evidence relevant to his equal protection claim to survive summary judgment. Petition For Writ of Certiorari, pp. 19-21.

Note also that each of these contentions fundamentally raise only issues relative to the proper interpretation of state law and/or the evaluation of evidence. Therefore, even assuming the courts below were in error, it is not the role of this Court to correct such matters.

To the extent the lower courts applied federal constitutional law, the constitutional principles at issue have been thoroughly developed by this Court. There is no undecided issue of federal law or any need for this Court to settle any constitutional issue arguably implicated by the Petition. *See*, S.Ct.R. 10(c).

Therefore, lacking any compelling reason for review, this Petition should be denied.

1.2 The Constitutional Issues Relevant to This Case Have Been Clearly Defined by This Court's Prior Decisions

Here, the central constitutional question is whether Mr. Goodspeed had a "property interest" protected by the Fourteenth Amendment to the United States Constitution. This question was thoroughly addressed by this Court's decision in *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

In *Roth*, an untenured assistant professor at Wisconsin State University, contended his right to due process guaranteed under the Fourteenth Amendment was violated when the university failed to re-hire him after the expiration of his one-year employment contract. In considering whether Roth had any constitutionally protected interest, the Court discussed in detail the "attributes" of property interests protected by the Due Process Clause of the Fourteenth Amendment. *Roth*, 408 U.S. at 577. There, the Court stated:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. . . .
>
> . . . Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law rules or understandings that secure certain benefits.

Roth, 408 U.S. at 577.

In the years since *Roth* was decided, this Court has adhered to the constitutional principles outlined in it. *See Phillips et al. v. Washington Legal Foundation*, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998); *Delaware v. New York*, 507 U.S. 490, 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993); *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (defamation alone does not give rise to due process claim without deprivation of some constitutionally protected interest as outlined in *Roth*).

In *Peer v. Griffeth*, 445 U.S. 970, 100 S.Ct. 1348, 64 L.Ed.2d 247 (1980), the Court denied a Petition for Certiorari wherein the petitioner alleged he was deprived of due process when his right to state welfare benefits were denied for failure to meet requirements imposed by state law. Chief Justice Rehnquist dissented, indicating, in his opinion, that the Court of Appeals, Ninth Circuit, had extended the Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), not only to welfare recipients, but also to welfare applicants. In concluding that such an extension of the Court's ruling merited plenary review, Justice Rehnquist discussed the status of *Roth*, saying:

> There has been much decisional law from this and other courts, and much scholarly commentary as to what is a protected "property" interest under the Fourteenth Amendment's Due Process Clause, and what procedural guarantees are necessary under that Clause before one may be denied such a property interest. *See*, e.g., *Goldberg v. Kelly, supra; Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); Van Alstyne, *Cracks in "The New*

> *Property": Adjudicative Due Process in the Administrative State,* 62 Cornell L.Rev. 445 (1977). Obviously **this Court cannot parse every state-law provision to determine whether it creates a protected "property interest"** under the Due Process Clause of the Fourteenth Amendment.

Peer, 445 U.S. at 970 (emphasis added).[3]

In this case, there is no suggestion that the rule of law established in *Roth* is in need of clarification or was improperly applied by the courts below.

Based on the principles in *Roth,* any constitutional issue herein turns on interpretation of state law, that is, whether SEPA conferred a property interest on Mr. Goodspeed when he received a DNS issued on the basis of false and/or incomplete information supplied by him.

Granting review would require this Court to "parse" through the Washington State Environmental Policy Act, applying *settled* constitutional principles.

Review should not be granted; there is no important, undecided federal question presented by this Petition and there is no conflict between the Ninth Circuit's decision herein and those of this Court, any other United States court of appeals or the Washington State Supreme Court.

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[3] Justice Rehnquist ultimately concluded that consideration of whether the Constitution provides protection, independent of any state law, was particularly important where state law does not create protected property interests.

2. The Court Below Properly Applied Washington State's Environmental Policy Act in Concluding No Constitutionally Protected Interest Existed

Washington's SEPA requires that "environmental amenities and values be given appropriate consideration" when governmental agencies make land use decisions. *Anderson v. Pierce County*, 86 Wash. App. 290, 300, 936 P.2d 432 (1997), *citing* RCW 43.21C.030(2)(b). A key step in the SEPA process is making a "threshold determination" whether the project will have a "probable significant adverse environmental impact." *Pease Hill Community v. County of Spokane*, 62 Wash. App. 800, 809, 816 P.2d 37 (1991); *see also*, WAC 197-11-330 through WAC 197-11-340. At this initial stage, if the project is held to have a probable significant adverse environmental impact, an Environmental Impact Statement (EIS) is required; if not, a Determination of Non-Significance (DNS) is issued and no EIS is required. WAC 197-11-330.

In order to make this initial determination, the SEPA process is initiated by the applicant submitting an Environmental Checklist which Washington Courts have indicated must:

> Provide information reasonably sufficient to evaluate the environmental impact of the proposal.

Anderson v. Pierce County, 86 Wash. App. 290, 301, 936 P.2d 432 (1997). The responsible official must then "thoroughly consider a proposal's potential environmental significance as documented in the environmental checklist." *Id., citing* WAC 197-11-315(1)(a).

In making a threshold determination, a governmental agency must demonstrate that the environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA. *Sisley v. San Juan County*, 89 Wash.2d 78, 85, 569 P.2d 712 (1977); *Pease Hill Community Group v. County of Spokane*, 62 Wash. App. 800, 809-10, 816 P.2d 37 (1991). Such a threshold determination must be based on a review reasonably sufficient to determine the environmental impact of a proposal. *Pease Hill*, 62 Wash. App. at 810.

After the threshold determination is made, SEPA requires a mandatory 15-day public comment period. WAC 197-11-340 (1992). Based on these comments:

> [t]he responsible official . . . may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS.

WAC 197-11-340(2)(f). Threshold determinations may be appealed administratively, if permitted by local agency procedures. RCW 43.21C.075(3)(a) (1992). Whitman County provided such appellate procedures by Whitman County Ordinance 9.04.080(C) (1979).

SEPA regulations require that an agency *shall* withdraw a DNS if:

1. There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

2. There is significant new information indicating, or on, a proposal's probable significant adverse environmental impact; or

> 3. The DNS was **procured by misrepresentation or lack of material disclosure**. . . .

WAC 197-11-340, Appendix B-5 (emphasis added).

Washington courts have consistently held that land use determinations issued based on false information or in violation of a statute are void at their inception. *See, Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 481-4, 513 P.2d 36 (1973). Such a land use determination confers no rights. *Id.*

This longstanding principle of Washington law was first discussed by the Washington State Supreme Court in *Nolan v. Blackwell*, 123 Wash. 504, 212 P. 1048 (1923). There, a building permit was issued by the City of Seattle under the misunderstanding that the building was to be constructed in the fourth district of the city where such a building was permitted. In fact, the building was to be constructed in the second district where such a building was prohibited.

After the permit was revoked, Mr. Nolan, the landowner, brought suit alleging he had a vested right in the permit. The Washington State Supreme Court rejected this contention, stating:

> The permit being in violation of the ordinance, and having been issued under a mistake of fact, it conferred no right upon the respondent. . . .
>
> . . . That a building permit was issued in violation of law or under mistake of fact confers no rights is well established.

Nolan, 123 Wash. at 506.

Subsequent to *Nolan*, the Washington courts have continued to hold that no interest is created in a property determination based on errors of fact. *See, Eastlake Community Council v. Roanoke Assoc., Inc.*, 82 Wash.2d 475, 484, 513 P.2d 36 (1973); *Steele v. Queen City Broadcasting Co.*, 54 Wash.2d 402, 408, 341 P.2d 499 (1959); *Indus. Hydraulics v. City of Aberdeen*, 27 Wash. App. 123, 124-5, 619 P.2d 980 (1980); *J & B Dev. Co., Inc. v. King County*, 29 Wash. App. 942, 631 P.2d 1002 (1981).

Accordingly, Washington courts have held that building permits issued without compliance with SEPA are void. *Eastlake Community Council*, 82 Wash.2d at 487-99; *see also, Victoria Tower Partnership v. City of Seattle*, 49 Wash. App. 755, 745 P.2d 1328 (1987) (vested right doctrine applies to SEPA).

In this case, the courts below properly applied Washington law in concluding that a SEPA determination based on a mistake of fact conferred no rights upon Mr. Goodspeed. Whitman County issued the DNS under the mistaken belief that Mr. Goodspeed had accurately represented that the project was not in a flood plain and that its water use would not adversely affect other properties. Mr. Goodspeed's failure to provide material information "reasonably sufficient to evaluate" the impact of the proposal made it impossible for Whitman County to fulfill its statutory duties under SEPA.

Petitioner's argument that summary judgment was inappropriate because he did not make any misrepresentations or fail to disclose material information is without merit.

In resisting a motion for summary judgment, Mr. Goodspeed cannot simply rest on conclusory allegations. *See, Yarnevic v. Brink's, Inc.*, 102 F.3d 753, 757-8 (4th Cir. 1996) (plaintiffs could not rely on complaint's unsupported allegations to resist summary judgment). Contrary to his answer in the Environmental Checklist, Mr. Goodspeed admits that 7% of the project was, in fact, on the flood plain. Petition for Writ of Certiorari, pp. 7-8 and 17-18. Given this admission, there can be no question that Judge Whaley's judgment was correct in concluding that Mr. Goodspeed made a misrepresentation with respect to or failed to disclose this circumstance on his Environmental Checklist.

As the DNS was clearly issued on the basis of false and/or incomplete information which Whitman County took to be correct, the DNS was void at its inception. Accordingly, Mr. Goodspeed never acquired any constitutionally protected property interest under Washington State law.

In short, the Petition should be denied because the Ninth Circuit and the District Court properly interpreted and applied Washington State law and the Petitioner raised no genuine issue of material fact which precluded resolution of the case by summary judgment.

3. Petitioner's Equal Protection Claim Has No Merit

The Equal Protection Clause of the Fourteenth Amendment, § 1, provides that no state shall "deny to any person within its jurisdiction equal protection of the laws." The Equal Protection Clause does not forbid classifications; instead, it:

> [S]imply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.

Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1 (1992).

In order to prevail on an equal protection claim, the claimant must show that the state acted with some discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 239-40, 96 S.Ct. 2040, 2047, 48 L.Ed.2d 597 (1976); *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), *reh'g denied*, 482 U.S. 920. In *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979), the Court explained:

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Feeney, 442 U.S. at 279 (citation and footnote omitted).

No equal protection claim exists where no showing is made that anyone comparably situated has been treated differently than the petitioner. *Nordlinger*, 505 U.S. at 10; *Palmer v. Thompson*, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971); *Christian Gospel Church v. San Francisco*, 896 F.2d 1221 (9th Cir. 1990). Accordingly, the Court has dismissed equal protection claims where the petitioner has not identified any disparate treatment. *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 41, 75 S.Ct. 92, 99 L.Ed. 46 (1954) (no difficulty with Equal Protection

Clause claim because "no showing has been made that anyone comparably situated has been treated differently from petitioner.")

In *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962), the Court considered whether a criminal defendant's equal protection interests were violated when the state courts failed to provide him procedural safeguards ordinarily afforded others. The Court held that misapplication of state law, without a showing of invidious discrimination, does not violate the Equal Protection Clause. *Id.* at 554. In reaching this conclusion, the Court said:

> [T]he petitioner's argument comes down to a contention that Washington law was misapplied. Such misapplication cannot be shown to be an invidious discrimination. We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions . . . [or] immunity from judicial error. . . . " Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question.

Beck, 369 U.S. at 554-5 (citation and internal quotations omitted).

Here, the Petitioner has not argued below that he was treated differently than anyone "similarly situated" or that he was discriminated against because of his membership in any class. For these reasons alone, Mr. Goodspeed's claim must fail.

Even if there was disparate treatment, however, Mr. Goodspeed must show that it was the result of

purposeful discrimination against him. He has made no such showing.

Accordingly, the Petitioner's equal protection claim does not present any important issue of federal law for resolution. *See* S.Ct.R. 10. Therefore, any review of this claim would necessarily and simply involve evaluating the evidence and affirming the clearly correct rulings below. Review for such purpose should not be granted.

CONCLUSION

The Petition discloses no compelling reason to grant it. It implicates no important unresolved federal question nor any decisional conflict requiring this Court's review. The decision of the Ninth Circuit Court of Appeals was the product of proper jurisprudence and a proper application of Washington State law.

Therefore, Respondent requests that the Court deny this Petition for Writ of Certiorari.

DATED: May 4, 1999.

Respectfully submitted,

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APPENDIX B

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I. RELEVANT EXCEPTIONS OF RECORD

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II. STATUTES, REGULATIONS AND ORDINANCES

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Appendix B-1

Excerpt of the Hearing on Motion for Summary Judgment and Motion for Dismissal of January 24, 1997, p. 18:

THE COURT: Are you making any claim for the handling of the Ranniger site or is this really focused on the Garrett site?

MR. JOHNSON: Focused on the Garrett site, Your Honor.

THE COURT: All right. So we can – the Ranniger site is background, but you are not claiming constitutional deprivation with respect to that site?

MR. JOHNSON: Correct, it is important that of what process was put into place at that time, however. At the Garrett site a SEPA checklist was submitted again.

WAC 197-11-315. Environmental checklist.

(1) Agencies:

(a) Shall use the environmental checklist substantially in the form found in WAC 197-11-960 to assist in making threshold determinations for proposals, except for: Public proposals on which the lead agency has decided to prepare its own EIS, or proposals on which the lead agency and applicant agree an EIS will be prepared.

(b) May use an environmental checklist whenever it would assist in their planning and decisionmaking, but shall not require an applicant to prepare a checklist under SEPA, unless a checklist is required by (1)(a) of this section.

(2) The lead agency shall prepare the checklist or require an applicant to prepare the checklist.

(3) The items in the environmental checklist are not weighted. The mention of one or many adverse environmental impacts does not necessarily mean that the impacts are significant. Conversely, a probable significant adverse impact on the environment may result in the need for an EIS.

WAC 197-11-330. Threshold determination process.

An EIS is required for proposals for legislation and other major actions significantly affecting the quality of the environment. The lead agency decides whether an EIS is required in the threshold determination process, as described below.

(1) In making a threshold determination, the responsible official shall:

(a) Review the environmental checklist, if used:

(i) Independently evaluating the responses of any applicant and indicating the result of its evaluation in the DS, in the DNS, or on the checklist; and

(ii) Conducting its initial review of the environmental checklist and any supporting documents without requiring additional information from the applicant.

(b) Determine if the proposal is likely to have a probable significant adverse environmental impact, based on the proposed action, the information in the checklist (WAC 197-11-960), and any additional information furnished under WAC 197-11-335 and 197-11-350; and

(c) Consider mitigation measures which an agency or the applicant will implement as part of the proposal.

(2) In making a threshold determination, the responsible official should determine whether:

(a) All or part of the proposal, alternatives, or impacts have been analyzed in a previously prepared environmental document, which can be adopted or incorporated by reference (see Part Six).

(b) Environmental analysis would be more useful or appropriate in the future in which case, the agency shall commit to timely, subsequent environmental review, consistent with WAC 197-11-055 through 197-11-070 and Part Six.

(3) In determining an impact's significance (WAC 197-11-794), the responsible official shall take into account the following, that:

(a) The same proposal may have a significant adverse impact in one location but not in another location;

(b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;

(c) Several marginal impacts when considered together may result in a significant adverse impact;

(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.

(e) A proposal may to a significant degree:

(i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetlands, wild and scenic rivers, or wilderness;

(ii) Adversely affect endangered or threatened species or their habitat;

(iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and

(iv) Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety.

(4) If after following WAC 197-11-080 and 197-11-335 the lead agency reasonably believes that a proposal may have a significant adverse impact, an EIS is required.

(5) A threshold determination shall not balance whether the beneficial aspects of a proposal outweigh its adverse impacts, but rather, shall consider whether a proposal has any probable significant adverse environmental impacts under the rules stated in this section. For example, proposals designed to improve the environment, such as sewage treatment plants or pollution control requirements, may also have significant adverse environmental impacts.

WAC 197-11-340. Determination of nonsignificance (DNS).

(1) If the responsible official determines there will be no probable significant adverse environmental impacts from a proposal, the lead agency shall prepare and issue a determination of nonsignificance (DNS) substantially in the form provided in WAC 197-11-970. If an agency adopts another environmental document in support of a threshold determination (Part Six), the notice of adoption (WAC 197-11-965) and the DNS shall be combined or attached to each other.

(2) When a DNS is issued for any of the proposals listed in (2)(a), the requirements in this subsection shall be met.

(a) An agency shall not act upon a proposal for fifteen days after the date of issuance of a DNS if the proposal involves:

(i) Another agency with jurisdiction;

(ii) Demolition of any structure or facility not exempted by WAC 197-11-800 (2)(f) or 197-11-880;

(iii) Issuance of clearing or grading permits not exempted in Part Nine of these rules; or

(iv) A DNS under WAC 197-11-350 (2), (3) or 197-11-360(4).

(b) The responsible official shall send the DNS and environmental checklist to agencies with jurisdiction, the department of ecology, and affected tribes, and each local agency or political subdivision whose public services would be changed as a result of implementation of the proposal, and shall give notice under WAC 197-11-510.

(c) Any person, affected tribe, or agency may submit comments to the lead agency within fifteen days of the date of issuance of the DNS.

(d) The date of issue for the DNS is the date the DNS is sent to the department of ecology and agencies with jurisdiction and is made publicly available.

(e) An agency with jurisdiction may assume lead agency status only within this fifteen-day period (WAC 197-11-948).

(f) The responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS or

supporting documents. When a DNS is modified, the lead agency shall send the modified DNS to agencies with jurisdiction.

(3)(a) The lead agency shall withdraw a DNS if:

(i) There are substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts;

(ii) There is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts; or

(iii) The DNS was procured by misrepresentation or lack of material disclosure; if such DNS resulted from the actions of an applicant, any subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

(b) Subsection (3)(a)(ii) shall not apply when a non-exempt license has been issued on a private project.

(c) If the lead agency withdraws a DNS, the agency shall make a new threshold determination and notify other agencies with jurisdiction of the withdrawal and new threshold determination. If a DS is issued, each agency with jurisdiction shall commence action to suspend, modify, or revoke any approvals until the necessary environmental review has occurred (see also WAC 197-11-070).

RCW 43.21C.075. Appeals.

(1) Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action. The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with the substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action.

(2) Unless otherwise provided by this section:

(a) Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

(b) Appeals of environmental determinations made (or lacking) under this chapter shall be commenced within the time required to appeal the governmental action which is subject to environmental review.

(3) If an agency has a procedure for appeals of agency environmental determinations made under this chapter, such procedure:

(a) Shall not allow more than one agency appeal proceeding on a procedural determination (the adequacy of a determination of significance/nonsignificance or of a final environmental impact statement), consistent with any state statutory requirements for appeals to local legislative bodies. The appeal proceeding on a determination of significance/nonsignificance may occur before the agency's final decision on a proposed action. Such an

appeal shall also be allowed for a determination of significance/ nonsignificance which may be issued by the agency after supplemental review;

(b) Shall consolidate appeal of procedural issues and of substantive determinations made under this chapter (such as a decision to require particular mitigation measures or to deny a proposal) by providing for simultaneous appeal of an agency decision on a proposal and any environmental determinations made under this chapter, with the exception of the threshold determination appeal as provided in (a) of this subsection or an appeal to the local legislative authority under RCW 43.21C.060 or other applicable state statutes;

(c) Shall provide for the preparation of a record for use in any subsequent appeal proceedings, and shall provide for any subsequent appeal proceedings to be conducted on the record, consistent with other applicable law. An adequate record consists of findings and conclusions, testimony under oath, and taped or written transcript. An electronically recorded transcript will suffice for purposes of review under this paragraph; and

(d) Shall provide that procedural determinations made by the responsible official shall be entitled to substantial weight.

(4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

(5) RCW 43.21C.080 establishes an optional "notice of action" procedure which, if used, imposes a time period for appealing decisions under this chapter. Some statutes and ordinances contain time periods for challenging governmental actions which are subject to review under this chapter, such as various local land use approvals (the "underlying governmental action"). This section does not modify any such time periods. This section governs when a judicial appeal must be brought under this chapter where a "notice of action" is used, and/or where there is another time period which is required by statute or ordinance for challenging the underlying governmental action. In this subsection, the term "appeal" refers to a judicial appeal only.

(a) If there is a time period for appealing the underlying governmental action, appeals under this chapter shall be commenced within thirty days. The agency shall give official notice stating the date and place for commencing an appeal. If there is an agency proceeding under subsection (3) of this section, the appellant shall, prior to commencing a judicial appeal, submit to the responsible official a notice of intent to commence a judicial appeal. The notice of intent shall be given within the time period for commencing a judicial appeal on the underlying governmental action.

(b) A notice of action under RCW 43.21C.080 may be used. If a notice of action is used, judicial appeals shall be commenced within the time period specified by RCW 43.21C.080, unless there is a time period for appealing the underlying governmental action in which case (a) of this subsection shall apply.

(c) Notwithstanding RCW 43.21C.080(1), if there is a time period for appealing the underlying governmental action, a notice of action may be published within such time period.

(6)(a) Judicial review of an appeal decision made by an agency under RCW 43.21C.075(5) shall be on the record, consistent with other applicable law.

(b) A taped or written transcript may be used. If a taped transcript is to be reviewed, a record shall identify the location on the taped transcript of testimony and evidence to be reviewed. Parties are encouraged to designate only those portions of the testimony necessary to present the issues raised on review, but if a party alleges that a finding of fact is not supported by evidence, the party should include in the record all evidence relevant to the disputed finding. Any other party may designate additional portions of the taped transcript relating to issues raised on review. A party may provide a written transcript of portions of the testimony at the party's own expense or apply to that court for an order requiring the party seeking review to pay for additional portions of the written transcript.

(c) Judicial review under this chapter shall without exception be of the governmental action together with its accompanying environmental determinations.

(7) Jurisdiction over the review of determinations under this chapter in an appeal before an agency or superior court shall upon consent of the parties be transferred in whole or part to the shorelines hearings board. The shorelines hearings board shall hear the matter and sign the final order expeditiously. The superior court

shall certify the final order of the shorelines hearings board and said certified final order may only be appealed to an appellate court.

(8) For purposes of this section and RCW 43.21C.080, the words "action", "decision", and "determination" mean substantive agency action including any accompanying procedural determinations under this chapter (except where the word "action" means "appeal" in RCW 43.21C.080(2) and (3)). The word "action" in this section and RCW 43.21C.080 does not mean a procedural determination by itself made under this chapter. The word "determination" includes any environmental document required by this chapter and state or local implementing rules. The word "agency" refers to any state or local unit of government. The word "appeal" refers to administrative, legislative, or judicial appeals.

(9) The court in its discretion may award reasonable attorneys' fees of up to one thousand dollars in the aggregate to the prevailing party, including a governmental agency, on issues arising out of this chapter if the court makes specific findings that the legal position of a party is frivolous and without reasonable basis.

Whitman County Ordinance 9.04.080 Environmental checklist.

A. Except as provided in WAC 197-10-300(2), a completed environmental checklist, or a copy thereof, substantially in the form provided in WAC 197-10-365, shall be filed at the same time as an application for a permit,

license, certificate, or other entitlement for use not specifically exempted herein. This checklist shall be the basis for a determination by the county as to lead agency status and, if the county is determined to be the lead agency, then for the threshold determination.

B. For all proposals for which the county is the lead agency, the responsible official of the county shall make the threshold determination pursuant to the criteria and procedures of WAC 197-10-300 through 197-10-365.

C. An individual has the right to appeal the threshold determinations made by the responsible official. Such appeal must be made in writing by letter to the board of county commissioners and said letter must be filed with the county auditor within fifteen days of the issuance of the initial threshold determination by the responsible official. In the event of an appeal, the appeal shall be heard at a regular meeting of the board of county commissioners within thirty days of the filing of the letter of appeal. The date of hearing said appeal shall be set by the chairman of the board of county commissioners. The threshold determination shall be reviewed and may be either upheld or modified by a majority decision of the board of county commissioners. The county auditor shall, at least ten days prior to said meeting, mail notice of the meeting to the appellant, at the appellant's last known address or to the address stated in the letter of appeal. There shall be no right of appeal from a threshold determination made by the responsible official in response to a directive of the board of county commissioners where the directive is the result of an appeal pursuant to this paragraph. (Ord. 31939 §8, 1978).